Supreme Court, U.S.
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No. 88-1652

# In The
# Supreme Court Of The United States

OCTOBER TERM, 1988

ROGER EMERICK,
*Petitioner,*

v.

WALTER BORDEN, et al.,
*Respondents.*

## BRIEF IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

*Pro Se Petitioner:*

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## STATEMENT OF CASE

The facts of this case are as articulated in petitioner's Petition for Writ of Certiorari. In addition to the facts presented there, petitioner presents the following facts which are in direct contradiction to those stated in the respondent's Statement of the Case. They are presented here in so far as they are to be considered relevant in consideration of this petition. They are:

1. The respondents claimed that they filed a Motion to Strike the Complaint on the

ground that the complaint failed to allege facts supporting the existence of a physician-patient relationship.

This is not so. The respondants filed a Motion to Strike solely for the following reason: "The complaint fails to state a cause of action of malpractice in that there is no allegation of any physician-patient relationship as between the plaintiff and defendants which would give rise to a legal duty owed to the plaintiff by the defendants."

2. The respondants claimed that the lower court held that the absence of facts supporting the existance of a physician-patient relationship was crucial and granted respondents' Motion for Summary Judgment.

This implies an incorrect basis for the granting of the Summary Judgment. As can be seen from the judgment included in petitioner's application for writ, the

Summary Judgement was granted solely on the grounds that the court claimed that plaintiff had not alleged a physician-patient relationship.

## ARGUMENT

### I. THERE IS A SUBSTANTIAL FEDERAL QUESTION RAISED IN THE STATE COURT.

Petitioner has brought his peitition on the claim that the granting of a summary judgment by the state court solely on the grounds of an alleged pleading defect, discovered by the court during private review of the motion, was in error where plaintiff was not given an opportunity to correct the defect.

Respondents argue there is no substantial federal question raised in the state court. Petitioner claims the contrary. The Rules of

Practice and General Statutes cited in his petition are the same as those used in his appeal to the State Appellate Court. They outline the rules of civil procedure in the state court, which are the cornerstone of ensuring that the basic elements of due process are met. Petitioners' appellate arguements were that the many cited rules of practice and procedure, as prescibed by the Ct. Practice Book and the Ct. General Statutes, were being violated by the lower courts ruling. Had any of them been followed, plaintiffs' case would not have been dismissed. Compliance with these rules is synonomous with securing petitioners' right to due process under the United States Constitution.

II. WHETHER OR NOT THE GRANTING OR DENIAL OF PETITIONER'S MOTION TO AMEND AND FILE A SUBSTITUTE COMPLAINT WAS WITHIN THE DISCRETION OF THE TRIAL COURT IS IRRELEVANT TO THIS PETITION.

The respondents argue:

"The Emerick case is a civil action. The Appellate Court appropriately reviewed the chronology of the pleadings in the case in considering whether the lower court abused its discretion and found no error under existing law and procedure. There was adequate and independent nonfederal grounds upon which the Connecticut Appellate Court could and did find no error."

There is no arugment by petitioner as to whether the lower court had the right to grant or deny his motion to amend; But rather whether the lower court was correct in the ruling it gave during the exercise of that right.

The Appellate Court decision was a simple "No Error" without discussion. It is innappropriate for the respondants to argue that the Appellate Court appropriatly reviewed the chronology of the pleadings and found no error based on nonfederal grounds. It is unknown what, if any, criteria the Appellate Court relied on in reaching its' decision.

## CONCLUSION

Adherance to the rules of civil practice and procedure as articulated by the Ct. Practice Book and the Ct. General Statutes, is synonomous with securing a litigants civil right to due process.

As claimed, the granting of a summary judgment solely on the grounds of pleading defect discovered by the court during a private review of the motion, and without permitting an amendment to correct said defect, is a violation of due process under the U.S. Constitution.

Respectfully Submitted

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